

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
	:	
of	:	
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<b>GREGORY SEELEY</b>	:	DETERMINATION
	:	DTA NO. 819473
for Redetermination of Deficiencies or for Refund of New	:	
York State Personal Income Tax under Article 22 of the	:	
Tax Law for the Periods April 1, 1997 through June 30,	:	
1997 and December 15, 1997 through December 14, 1998.	:	

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Petitioner, Gregory Seeley, 4387 Princess Path, Liverpool, New York 13090, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the periods April 1, 1997 through June 30, 1997 and December 15, 1997 through December 14, 1998.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 333 East Washington Street, Syracuse, New York on September 16, 2004 at 12:30 P.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Lucille Palmer).

Since neither party herein elected to file a post hearing brief, the three-month period for the issuance of this determination commenced as of the date the hearing was held.

***ISSUE***

Whether petitioner was a person required to collect, truthfully account for and pay over the New York State income taxes withheld by Spinit Co., Inc. from the wages paid to its employees and, if so, whether he willfully failed to perform such duties and is thus liable for a penalty equal in amount to the taxes not collected, truthfully accounted for and paid over.

***FINDINGS OF FACT***

1. In late 2000, the Division of Taxation (“Division”) determined that there were employees of Spinit Co., Inc. (hereinafter “Spinit”) who had claimed credit on their 1997 and 1998 income tax returns for New York State tax withheld from wages paid by Spinit. The Division’s records also revealed that Spinit had not reported any New York State wages paid or tax withheld for these employees. On April 18, 2001, an auditor from the Division’s Capital Region District Office met with Mr. Edward France, the president of Spinit and the individual identified as the tax matters person, to review Spinit’s withholding tax records. The auditor determined that Spinit had collected \$13,613.75 of New York State tax withheld from employee wages for the periods April 1, 1997 to June 30, 1997 and December 15, 1997 through December 14, 1998 and that it had failed to remit this amount to the Division as required by law.

2. The Division issued a Statement of Proposed Audit Adjustments to Spinit asserting that \$13,613.75 of tax was due, together with penalties and interest. On June 8, 2001, Mr. France signed the Consent to Findings section of the Statement of Proposed Audit Adjustments agreeing that Spinit was liable for the amounts asserted due therein. Since Spinit had ceased all operations in late 1998, it had no funds with which to pay the liability it had consented to.

3. During the course of the audit, the Division concluded that Edward France, Lawrence McCormick and petitioner, Gregory Seeley, were responsible officers of Spinit because of their active involvement in the business, their ownership interest in the business and their status as officers of the corporation. Accordingly, on February 7, 2002, the Division issued two notices of deficiency each to Edward France, Lawrence McCormick and petitioner asserting that they were each “an Officer/Responsible Person of Spinit Co., Inc.” and, as such, separately liable, pursuant to Tax Law § 685(g), “for a penalty in an amount equal to the tax not paid” by Spinit. The

following table sets forth the amount asserted due in each Notice of Deficiency and the respective period:

<b>PERIOD</b>	<b>AMOUNT</b>
04-01-1997 to 06-30-1997	\$3,313.28
12-15-1997 to 12-14-1998	\$10,300.47

Edward France and Lawrence McCormick did not protest the notices of deficiency issued to them and said notices have thus become assessments subject to collection action. Petitioner filed a timely petition protesting the notices of deficiency issued to him on the basis that he was not involved in the financial affairs of the corporation and was not the person responsible for collecting and remitting the taxes withheld by Spinit from employees' wages.

4. Spinit was incorporated in New York State on February 7, 1994 and was dissolved by proclamation of the Secretary of State on June 27, 2001. Spinit's officers were Edward France, president; Lawrence McCormick, secretary/treasurer and Gregory Seeley, vice-president of operations. Each of these individuals owned one-third of Spinit's issued and outstanding stock and each was active in Spinit's operations on a daily basis.

5. Spinit's business involved unloading trucks at a regional warehouse located in Syracuse, New York.<sup>1</sup> Spinit employed mostly transient workers, and as vice president of operations it was petitioner's responsibility to see that there were sufficient employees at the Syracuse warehouse to unload the trucks. Petitioner worked exclusively at the warehouse from 6:00 A.M. to 2:00 P.M., five days a week and spent little or no time at Spinit's office location.

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<sup>1</sup> Later in the audit period Spinit attempted to expand its operations by unloading trucks at a warehouse in Albany, New York.

6. Based on information provided to the Division's auditor by Mr. France, there is no dispute that Edward France handled all financial, business and tax matters for Spinit and that he was the individual responsible for determining which creditors were paid. Mr. France readily admits that he was the one solely responsible for collecting and remitting New York State taxes withheld from employee wages and his statements confirmed that petitioner had no control over Spinit's business or financial affairs. Mr. France, or an office manager, signed almost all of the checks for Spinit. Although petitioner was authorized to sign checks drawn on Spinit's Fulton Savings Bank checking account, he rarely signed any checks. On the few occasions when petitioner did sign a check, it would be a blank one that was left for him by Mr. France and was used to buy box cutters and tape at a local hardware store for use by employees at the warehouse location. The Fulton Savings Bank checking account was closed in March 1998 and was replaced by a Key Bank checking account. Petitioner was not an authorized signer on the Key Bank checking account.

7. As noted earlier, petitioner's entire work day was spent at the warehouse overseeing the employees working at this location. Petitioner had authority to hire and fire employees at the warehouse location; however he was not involved in making decisions regarding financial, business or tax matters. Petitioner did not sign any tax returns on behalf of Spinit, and he had no control over the books or finances of the corporation. On the one occasion when petitioner asked Mr. France to see the books, he was effectively denied access when Mr. France balked at petitioner's lack of trust in his abilities. Since Mr. France was older than petitioner, was admittedly more sophisticated in business matters and was somewhat intimidating in petitioner's eyes, petitioner did not further pursue his request to see the books.

8. In late 1998 petitioner was surprised when he was told by officials at the warehouse that Spinit's employees could no longer work at the warehouse since Spinit's workers' compensation policy had been canceled due to failure to pay the premium. When petitioner questioned Mr. France regarding this matter, he was told that Spinit had no funds and had to cease all operations.

9. In addition to failing to pay New York State withholding taxes, Spinit also failed to remit to the Internal Revenue Service ("IRS") a substantial amount of Federal taxes. Petitioner was interviewed by the IRS concerning his involvement with Spinit to ascertain if he should be assessed as a responsible person for the past due Federal taxes owed by Spinit. The IRS ultimately concluded that petitioner was not personally liable for payment of the Federal taxes owed by Spinit.

### ***CONCLUSIONS OF LAW***

#### **A. Tax Law § 685(g) provides as follows:**

Willful failure to collect or pay over tax.--Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

Tax Law § 685(n), in turn, furnishes the following definition of a "person" subject to the section 685(g) penalty:

the term person includes an individual, corporation, partnership or limited liability company or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, or a member, manager or employee of a limited liability company, who as such officer, employee, manager or member is under a duty to perform the act in respect of which the violation occurs.

B. The question of whether someone is a “person” under a duty to collect and pay over withholding taxes is a factual one. Factors which should be considered are, *inter alia*, whether the particular individual signed tax returns, derived a substantial part of his or her income from the corporation, or had the right to hire and fire employees (*Matter of Malkin v. Tully*, 65 AD2d 228, 412 NYS2d 492, 494, *affd* 49 NY2d 920, 428 NYS2d 675). Other pertinent areas of inquiry include the person’s official duties, the amount of corporation stock he or she owned, and their authority to pay corporate obligations (*Matter of Amengual v. State Tax Commn.*, 95 AD2d 949, 464 NYS2d 272,273; *see, Matter of McHugh v. State Tax Commn.*, 70 AD2d 987, 417 NYS2d 799, 801).

C. Summarized in terms of a general proposition, the issue to be resolved is whether petitioner had, or could have had, sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question (*Matter of Constantino*, Tax Appeals Tribunal, October 22, 1990; *Matter of Chin*, Tax Appeals Tribunal, December 20, 1990). Furthermore, if petitioner is found to be a person under a duty as described, it must then be decided whether his failure to withhold and pay over such taxes was willful. The question of willfulness is related directly to the question of whether petitioner was a person under a duty, since clearly a person under a duty to collect and pay over the taxes is the one who can consciously and voluntarily decide not to do so. However, merely because one is determined to be a person under a duty, it does not automatically follow that a failure to withhold and pay over income taxes is “willful” within the meaning of that term as used in Tax Law § 685(g). As the Court of Appeals indicated in *Matter of Levin v. Gallman* (42 NY2d 32, 396 NYS2d 623), the test is:

whether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the

Government will not be paid over but will be used for other purposes. . . . No showing of intent to deprive the Government of its money is necessary but only something more than accidental non-payment is required (*id.*, 396 NYS2d at 624-625; *see, Matter of Lyon*, Tax Appeals Tribunal, June 3, 1988).

D. After careful consideration of the entire record, I conclude that petitioner has sustained his burden of proof (Tax Law § 689[e]) to demonstrate that he was not a person required to collect and remit the New York State income taxes withheld by Spinit from employees' wages. While there exists some evidence which would suggest that petitioner was a responsible person, specifically his status as an officer and stockholder of the corporation and his status as an authorized signer on the corporate checking account for a portion of the period at issue, this evidence is, in my view, outweighed by the fact that petitioner had no authority or control over the financial and business affairs of the corporation, did not sign tax returns, had no knowledge that taxes were not being remitted, was effectively precluded from reviewing Spinit's books by Mr. France and has been released by the IRS from personal liability for the Federal taxes owed by Spinit (*see, e.g., Matter of Turiansky*, Tax Appeals Tribunal, April 29, 1993; *Matter of Moschetto*, Tax Appeals Tribunal, March 17, 1994; *Matter of Constantino, supra*). The documentary evidence coupled with petitioner's credible testimony support that he was not a person required to collect and remit the New York State income taxes withheld by Spinit.

E. The petition of Gregory Seeley is granted and the two notices of deficiency dated February 7, 2002 are hereby canceled.

DATED: Troy, New York  
December 16, 2004

/s/ James Hoefer  
PRESIDING OFFICER